BINA JATI SDN BHD

v.

SUM-PROJECTS (BROTHERS) SDN BHD

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
ABDUL KADIR SULAIMAN JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO: W-02-114-2000]
26 DECEMBER 2001

ARBITRATION: *Stay of proceedings - Allegations of fraud - Whether High Court has jurisdiction to stay arbitration proceedings - Whether party charged with fraud entitled as of right to a stay of proceedings - Whether party charging the other with fraud can seek the discretion of the court to stay proceedings - Arbitration Act 1952, ss. 6, 25(2)*

ARBITRATION: *Stay of proceedings - When available - Issues of fraud - Allegations involving parties outside arbitration clause - Multiplicity of proceedings - Injustice to party - Whether grounds for stay - Para. 11 of Schedule to Courts of Judicature Act 1964 - Rules of the High Court 1980, O. 92 r. 4*

ARBITRATION: *Agreement - Dispute - Issues of assignments, fraud, collusion - Allegations involving parties outside arbitration clause - Whether matters concerned were outside arbitrator's jurisdiction - Whether High Court to determine issues - Arbitration Act 1952, s. 25(2) - Para. 11 of Schedule to Courts of Judicature Act 1964 - Rules of the High Court 1980, O. 92 r. 4*

ARBITRATION: *Arbitrator - Ousting of arbitrator's jurisdiction - Whether limited to issue of fraud*

The parties herein had referred the dispute between them arising out of a building contract for arbitration. Subsequently, the respondent sent a notice to the appointed arbitrator that it would be applying to the High Court to revoke his authority on grounds that the issues it wished to raise would not be within the ambit of arbitration. The respondent then applied to the High Court which allowed the respondent to proceed with its action in court. Hence, the appellant's appeal.

The appellant claimed that the learned judge of the High Court erred in fact and in law when he decided the following issues: (1) that the appellant had raised s. 34 of the Arbitration Act 1952 ('the Act'); (2) that the issues of assignments, fraud, collusion and misconduct of the appellant involving an

architect and engineer were outside the jurisdiction of the arbitrator; (3) that the High Court had the jurisdiction to hear the matters concerned after the commencement of the arbitration; (4) that the High Court had jurisdiction to stay arbitration upon allegations of fraud; and (5) that the arbitrator had himself ruled that the dispute concerned was outside his jurisdiction.

Held:

Per Alauddin Mohd Sheriff JCA

[1] The records available before the court showed that the appellant had raised s. 34(1) of the Act. Therefore, the learned judge had not committed any error in that respect. (pp 433 h-i, 444 a)

[2] The court agreed with the learned judge that the issues of assignments, fraud, collusion and misconduct of the appellant involving the architect and the engineer were issues outside the arbitrator's jurisdiction. The fact that the appellant disputed those allegations was irrelevant. The allegations have to be tried and the question was who could and should try them. Where some are parties and others are not parties, it is best that their disputes be dealt with by the court. Further, disputes between parties cannot be divided so that part is dealt with by arbitration and another part in court. (pp 444 b-i, 445 c-d)

[3] The High Court has supervisory jurisdiction over arbitration and arbitrators. Section 25(2) of the Act provides that the question of fraud in disputes between parties to an agreement is to be determined by the High Court. The High Court has the power to order that the agreement shall cease to have effect and the power to revoke the authority of any arbitrator therein. Paragraph 11 of the Schedule to the Courts of Judicature Act 1964 provides additional power to the High Court to dismiss or stay proceedings by reason of multiplicity of proceedings. In any event, the High Court can invoke its inherent powers under O. 92 r. 4 of the Rules of the High Court 1980 to make any order as may be necessary to prevent injustice. In the present appeal, the respondent should not be harassed by a succession of proceedings as it was under a threat of a winding-up petition. (p 445 e-h)

[3a] The learned judge had duly considered and weighed the fact that the challenge to the arbitrator's jurisdiction was made after commencement of the arbitration. The issue had become clear only after the appellant filed its statement of claim with the arbitrator and the respondent went through its case for the preparation of the defence and counterclaim. (p 446 c-d)

[3b] The ousting of the arbitrator's jurisdiction was not limited to fraud alone but extended to: (1) the avoidance of multiplicity of suits; (2) the allegations connected to the subject matter which affected parties who were outside the arbitration clause; and (3) that all issues ought to be tried by one tribunal. (p 446 d-e)

[4] Where allegations of fraud are made the court has a jurisdiction to stay the arbitration. The party charged with fraud is entitled as of right to a stay of arbitration whereas a party charging the other with fraud can seek the discretion of the court to stay arbitration. The fact that the respondent was charging the appellant with fraud did not prevent it from seeking a stay. The facts revealed were more than sufficient for the learned judge to stay the arbitration and he had rightly done so. (pp 446 h, 447 c-d)

[4a] The engineer and the architect were not parties to the arbitration clause and they could not be compelled to submit to arbitration. The arbitrator had no jurisdiction over them. The allegations of fraud and collusion between the appellant, the engineer and the architect could not be dealt with in any proceedings (including arbitration) unless both the engineer and the architect were parties to those proceedings. (p 447 e)

[5] Based on exh. S25 alone, the learned judge was more than justified in concluding that the arbitrator had himself declined to deal with the said allegations. Further, the appellant had not made any application to correct or set aside that view of the arbitrator. There was also no fault with the learned judge's finding that the appellant was bound by the arbitrator's ruling and that the application by the respondent to the High Court complied with that ruling. The ruling of the arbitrator was binding on both parties. (p 448 a-b)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Pihak-pihak di sini telah merujuk pertikaian antara mereka yang berbangkit dari satu kontrak binaan untuk timbangtara. Berikutan itu, responden telah mengirimkan satu notis kepada penimbangtara yang dilantik bahawa ianya akan memohon kepada Mahkamah Tinggi untuk membatalkan kuasa beliau atas alasan bahawa isu-isu yang ianya ingin bangkitkan tidak terlingkung di dalam lingkungan timbangtara. Responden kemudiannya memohon kepada Mahkamah Tinggi yang telah membenarkan responden untuk meneruskan tindakannya di mahkamah. Dengan itu, menyebabkan rayuan perayu.

Perayu menuntut bahawa hakim Mahkamah Tinggi yang bijaksana telah tersalah pertimbangan di sisi undang-undang dan fakta ketika beliau memutuskan isu-isu yang berikut: (1) bahawa perayu telah membangkitkan s. 34 Akta Timbangtara 1952 ('Akta tersebut'); (2) bahawa isu-isu penyerahhakan, fraud, pakat-sulit dan salah laku perayu yang melibatkan seorang arkitek dan jurutera adalah di luar bidangkuasa penimbangtara; (3) bahawa Mahkamah Tinggi mempunyai bidangkuasa untuk mendengar perkara-perkara yang berkenaan selepas permulaan timbangtara tersebut; (4) bahawa Mahkamah Tinggi mempunyai bidangkuasa untuk menggantung timbangtara setelah dakwaan-dakwaan fraud; dan (5) bahawa penimbangtara tersebut telah dengan sendirinya memutuskan bahawa sebahagian daripada pertikaian tersebut adalah diluar bidangkuasa beliau.

Diputuskan:
Oleh Alauddin Mohd Sheriff HMR

[1] Rekod-rekod yang tersedia di hadapan mahkamah menunjukkan bahawa perayu telah membangkitkan s. 34(1) Akta tersebut. Oleh itu hakim yang bijaksana telah tidak melakukan sebarang kesilapan berhubung dengan perkara itu.

[2] Mahkamah bersetuju dengan hakim yang bijaksana bahawa isu penyerahhakan, fraud, pakat-sulit dan salah laku perayu yang melibatkan seorang arkitek dan seorang jurutera merupakan isu-isu yang di luar bidangkuasa penimbangtara. Hakikat bahawa perayu mempertikaikan dakwaan-dakwaan tersebut adalah tidak relevan. Dakwaan-dakwaan tersebut haruslah dibicarakan dan persoalannya siapa yang boleh dan seharusnya mencubanya. Di mana sebilangan merupakan pihak-pihak pertikaian dan yang lain pula bukan merupakan pihak-pihak pertikaian, adalah baiknya bahawa pertikaian mereka diuruskan oleh mahkamah. Selanjutnya, pertikaian antara pihak-pihak tidak boleh dibahagikan di mana sebahagian pertikaian tersebut diuruskan melalui timbangtara dan sebahagian yang lain pula dalam mahkamah.

[3] Mahkamah Tinggi mempunyai bidangkuasa penyeliaan ke atas timbangtara dan penimbangtara. Seksyen 25(2) Akta tersebut memperuntukkan bahawa persoalan fraud dalam pertikaian-pertikaian antara pihak-pihak sesuatu perjanjian haruslah ditentukan oleh Mahkamah Tinggi. Mahkamah Tinggi mempunyai kuasa untuk memerintah supaya perjanjian tersebut tidak lagi berkuatkuasa dan kuasa untuk membatalkan kuasa sebarang penimbangtara di dalamnya. Perenggan 11 jadual kepada Akta Mahkamah Kehakiman 1964 memberikan kuasa tambahan kepada

Mahkamah Tinggi untuk membatalkan atau menggantungkan prosiding disebabkan penggandaan prosiding. Namun, Mahkamah Tinggi boleh menggunakan kuasa-kuasa sedia adanya di bawah A. 92 k. 4 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk membuat sebarang perintah sepertimana yang mungkin perlu untuk menghalang ketidakadilan. Dalam rayuan semasa, responden tidak seharusnya diganggu oleh prosiding yang berturut kerana ianya di bawah ugutan petisyen penggulungan.

[3a] Hakim yang bijaksana telah mempertimbangkan hakikat bahawa cabaran kepada bidangkuasa penimbangtara telah dibuat selepas permulaan timbangtara. Isu tersebut telah menjadi jelas hanya selepas perayu memfailkan pernyataan tuntutannya dengan penimbangtara dan responden telah meneliti kesnya untuk penyediaan pembelaan dan tuntutan balas.

[3b] Penyingkiran bidangkuasa penimbangtara tidak terhad kepada fraud sahaja tetapi dilanjutkan kepada: (1) elakkan penggandaan guaman-guaman; (2) dakwaan-dakwaan yang dikaitkan dengan hal perkara yang menjejaskan pihak-pihak yang di luar lingkungan fasal timbangtara; dan (3) bahawa kesemua isu-isu haruslah dibicarakan oleh satu tribunal.

[4] Di mana dakwaan mengenai fraud dibuat mahkamah mempunyai bidangkuasa untuk menggantungkan timbangtara. Pihak yang dituduh melakukan fraud berhak menurut haknya kepada satu penggantungan timbangtara sedangkan pihak yang menuduh pihak yang lain dengan fraud boleh mendapatkan budibicara mahkamah untuk menggantungkan timbangtara. Hakikat bahawa responden menuduh perayu melakukan fraud tidak menghalangnya daripada mendapatkan penggantungan. Fakta-fakta yang didedahkan adalah lebih mencukupi untuk hakim yang bijaksana menangguhkan timbangtara dan beliau telah melakukan sedemikian dengan betulnya.

[4a] Jurutera dan arkitek tersebut bukannya pihak-pihak kepada fasal timbangtara dan mereka tidak boleh dipaksa untuk berhujah kepada timbangtara. Penimbangtara tiada bidangkuasa ke atas mereka. Dakwaan-dakwaan fraud dan pakat-sulit antara perayu, jurutera dan arkitek tidak boleh diuruskan dalam mana-mana prosiding (termasuk timbangtara) kecuali kedua-duanya adalah pihak-pihak kepada prosiding itu.

[5] Berdasarkan eks. S25 sahaja, hakim yang bijaksana lebih daripada wajar memutuskan bahawa penimbangtara telah dengan sendirinya menidakkan untuk menguruskan dakwaan-dakwaan tersebut. Selanjutnya, perayu telah tidak membuat sebarang permohonan untuk membetulkan atau

mengenepikan pandangan penimbangtara akan perkara itu. Tiada kesilapan pada keputusan hakim yang bijaksana bahawa perayu telah terikat oleh keputusan penimbangtara dan bahawa permohonan oleh responden kepada Mahkamah Tinggi telah mematuhi keputusan itu. Keputusan penimbangtara mengikat kedua-dua pihak.

[Rayuan ditolak.]

Case(s) referred to:

Beaufort Development Ltd v. Gilbert-Ash NI Ltd [1998] WLR 860 ***(foll)***
Camilla Cotton Oil Co v. Granadex [1976] 2 Lloyd's Rep 20 ***(foll)***
Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 ***(refd)***
Oxford Shipping Co Ltd v. Nippon Yusen Kaisha (The Eastern Saga) [1984] 3 All ER 835 ***(foll)***
Radford v. Hair & Ors [1971] 2 All ER 1089 ***(foll)***
Sarawak Shell Bhd v. PPES Oil and Gas Sdn Bhd [1998] 3 CLJ 275 ***(refd)***
Tan Lay Soon v. Kam Mah Theatres Sdn Bhd; Malayan United Finance Bhd (Intervener) [1992] 4 CLJ 1922; [1992] 3 CLJ (Rep) 657 ***(refd)***
Turner v. Fenton [1982] 1 WLR 52 ***(foll)***
Turnock v. Sartoris [1889] 43 Ch D 150 ***(refd)***

Legislation referred to:

Arbitration Act 1952, ss. 6, 25(2), 34(1)
Companies Act 1965, s. 218
Court of Judicature Act 1964, para. 11 Sch
Rules of the High Court 1980, O. 92 r. 4

For the appellant - Logan Sabapathy (Ooi Huey Miin); M/s Logan Sabapathy & Co
For the respondent - RR Sethu (YS Leong); M/s Lye Poh Kham & Assoc

[Appeal from High Court, Kuala Lumpur; Originating Summons No: R2-24-64-99]

Reported by Usha Thiagarajah

JUDGMENT

Alauddin Mohd Sheriff JCA:

This appeal against the decision of the High Court Kuala Lumpur arises out of a building contract in PAM Form (exh. S1 in encl. 1). The contract was entered into between the respondent (plaintiff) as employer and the appellant (defendant) as the main contractor for a hotel and hotel apartment project in Port Dickson. The articles of agreement and conditions of contract are set out in exh. S1 to Sum Weng Kuan's affidavit of 8 September 1999. The conditions of contract contain an arbitration cl. 34(1), which states that all disputes shall be referred to arbitration (see p. 62 encl. 1).

On 10 March 1998, the appellant determined its employment as contractor pursuant to cl. 26(1)(a) without prejudice to its other remedies for non-payment of certified sums amounting to RM6,992,831.95. Then on 11 March 1998, the appellant served a statutory notice under s. 218 of the Companies Act on the respondent in respect of the certified sums of RM6,992,831.95. The respondent contested the validity of the appellant's termination notice by letter dated 12 March 1998 and urged the appellant to continue and complete the works. However, by a letter dated 8 April 1998 the respondent gave their own notice terminating the appellant's employment under cl. 25(1)(b) of the contract. Thereafter, by way of Kuala Lumpur High Court (Bahagian Dagang) OS. No. D2-24-129-98, the respondent took steps to restrain the appellant from bringing a winding-up petition based on the statutory demand. Finally, the learned judge in those proceedings found for the respondent on the basis that there were grounds for contesting liability as at the date of the statutory demand and issued the restraining order (see exh. S10).

Both before and after the first set of High Court proceedings, the respondent had always insisted that the arbitration clause should be honoured and all disputes referred to arbitration. This is evidenced by four letters written by the respondent to the appellant on various dates in 1998 (see exh. NLL 6, 7, 8, 10). By their letter dated 18 December 1998 the respondent's solicitors agreed to refer all issues to arbitration and proposed several names of arbitrators. Thereafter as the parties were unable to agree to the choice of an arbitrator, the appellant, at the respondent's suggestion, applied on 5 January 1999 to the Kuala Lumpur Regional Centre for Arbitration (KLRCA) for the appointment of an arbitrator pursuant to the arbitration clause. It must be emphasised that at this stage both parties were fully *'ad idem'* that all disputes arising out of the contract should be dealt with by arbitration. However, the respondent had not signed the Letter of Acceptance of the arbitrator until now (see para. 15 encl. 1).

On 22 January 1999, the KLRCA appointed one Mr. Khoo Choong Keow as arbitrator and his first preliminary meeting was held on 30 March 1999. At this meeting a detailed 'case management' programme was mapped out by the arbitrator. There was absolutely no suggestion of any limitation on the arbitrator's authority or of any intention of referring matters back to court. The statement of claim (S/C) was filed by the appellant on 23 April 1999. In summary, the statement of claim raised the following issues:

a) A claim for RM8,799,995.77 in respect of architect's certificate of payment under certificates 14-19;

b) A claim for RM3,791,713.94 being the balance of work carried out by the defendant (appellant) but uncertified as at date of termination (including RM1,345,500 retention money);

c) A claim for extension of time (EOT) for package A up to 3 December 1997, or that the claimant had completed Package A within a reasonable time;

d) That the claimant is entitled to reasonable extension of time to Complete Package B;

e) Claim for reimbursement of RM808,000 liquidated damages (LAD) wrongfully deducted;

f) The sum of RM510,000 acceleration costs resulting from acceleration at plaintiff's (respondent's) request;

g) The sum of RM2,834,313.30 being 'direct loss and expense' claims made pursuant to cls. 11(6) and/or 24(1) as a result of variations ordered by the architect and delay and/or disruptions;

h) The sum of RM40,000 being loss of profits claimed under cl. 26(2) of the contract;

i) Interest;

j) General damages;

k) Costs.

On 21 May 1999 M/s Skrine & Co. who had hitherto been the respondent's solicitors gave notice that they were discharging themselves as the respondent's solicitors. Subsequent to this the arbitrator called a second preliminary meeting on 10 June 1999. At this meeting, the respondent who was unrepresented was given an extension of time until 9 August 1999 to file their defence and counterclaim.

On 1 July 1999, the respondent's current solicitors gave notice to the arbitrator that they would be making an application to the High Court to revoke the authority of the arbitrator on grounds that they wished to raise issues which would not be suitable for arbitration and would certainly be out of the ambit of arbitration, and hence any further steps taken in the arbitration would be under protest and without prejudice. It should be noted that this is the first occasion that the respondent ever gave any indication that they did not agree that all disputes be dealt with by arbitration in accordance with the contract.

On 9 August 1999, the respondent filed their defence and counterclaim in the arbitration proceedings. As regards the appellant's claim for payment under certificates 14-19 above, the respondent pleaded that these were monies payable to UOL Factoring Sdn. Bhd. (UOL) by virtue of the undertaking given by the respondent to UOL dated 20 May 1997 and the letter from UOL to the respondent dated 12 June 1997 (see para 44 of defence and counterclaim).

Amongst the issues raised by the respondent in their counterclaim are as follows:

a) A declaration that the claimant had wrongfully terminated the contract;

b) A declaration that the claimant had procured the contract by means of fraud;

c) A declaration that the claimant had negligently performed its obligation under the contract;

d) A declaration that the architect's certificate was false and fraudulently made and not conclusive;

e) Quantified claims arising out of defendant's (appellant's) alleged wrongful termination consisting of:

i) cost of completion of work by new contractor;

ii) increased cost of scope of work undertaken by new contractor;

iii) interest;

iv) LAD for packages A and B;

v) Loss of revenue;

f) Quantified claims arising from defendant's (appellant's) alleged defective work and need to rectify same;

g) Damages for fraud and fraudulent misrepresentation by defendant (appellant)/architect/engineer;

h) Damages for negligence by defendant (appellant)/engineer;

i) Interest;

j) Costs.

On 30 August 1999 the appellant filed their reply and defence to counterclaim in the arbitration proceedings.

On 8 September, the respondent filed the OS, accompanied by the affidavit of Sum Weng Kuan (see exh. S1) asking for the following relief:

a) A declaration that the disputes between plaintiff (respondent) and defendant (appellant) under the building contract are not arbitrable;

b) An injunction to restrain the defendant (appellant) from proceeding with arbitration;

c) The authority of the arbitrator be revoked;

d) Arbitration proceedings be stayed pending decision of the court.

The OS was served on the appellant on 29 September 1999 and on the arbitrator on 4 October 1999. The hearing of the OS was fixed on 25 November 1999. At the end of the hearing of the OS the learned judge concluded that the plaintiff (respondent) ought to be allowed to proceed with his action in court. He therefore allowed order in terms of the plaintiff's (respondent's) application. Hence, the present appeal before us.

Before us the learned judge's decision was attacked on the following grounds:

1) The learned judge erred in fact in stating that the appellant raised s. 34(1) of the Arbitration Act. The appellant never raised this issue and concedes that the Arbitration Act applies.

2) The learned judge erred in law and in fact in holding that the following issues are outside the jurisdiction of the arbitrator:

   a) Payments of architect's certificates and assignments;

   b) Fraud, collusion and misconduct of appellant involving architect and engineer.

3) The learned judge erred in law and in fact in that he failed to realise that the issue was not whether the High Court had original jurisdiction to hear and determine such matters but whether:

   i) the High Court had jurisdiction to; or

   ii) if it did have jurisdiction, ought in its discretion to take over the hearing of such matters after the commencement of the arbitration.

The learned judge ought to have held that after the commencement of the arbitration, the High Court had no jurisdiction to make the orders sought in this application or to take over the proceedings from the arbitrator either under its inherent powers or under the Arbitration Act or other statutory provisions except in respect of allegations of fraud pursuant to s. 25(2) of the Arbitration Act and that under the said subsection the court's powers are limited to taking over only the issues relating to the allegations of fraud.

The learned judge ought to have held on the contrary that the arbitrator had full jurisdiction to hear and determine all issues raised in the pleadings before him.

4) The learned judge erred in law and in fact in holding that because allegations of fraud have been made in the pleadings in the arbitration proceedings, it must follow that s. 25(2) should be applied to remove the arbitration proceedings to the High Court. The learned judge ought to have held that so far as the allegations of fraud are concerned, the court has a discretion to take over the hearing from the arbitrator pursuant to s. 25(2) of the Arbitration Act and the learned judge ought to have exercised his discretion against granting the orders sought on the grounds that:

   a) This is not a case where the court was being asked to exercise its discretion to refuse a stay of court proceedings under s. 6 of the Arbitration Act prior to the commencement of arbitration, but where the respondent had all along insisted on arbitration and had willingly participated in the arbitration proceedings;

   b) In this case, it is the party alleging fraud and not the party charged with fraud which is seeking a High Court trial;

   c) The balance of convenience strongly favoured that the allegations of fraud be dealt with by the arbitrator *inter alia* to avoid a split hearing, because of the many technical issues raised in the pleadings and because the allegations of fraud involved allegations of collusion between appellant and architect and engineer which would be well within the competence of the arbitrator to rule.

5) The learned judge had erred in law and in fact in holding that the arbitrator had himself ruled that part of the dispute is outside his jurisdiction and that the appellant is bound by that ruling and that the present application by the respondent complies with that ruling. In his finding the learned judge erred in law and in fact in that his finding was based on a wholly erroneous interpretation of the arbitrator's ruling in his letter to the parties dated 15 October 1999 (exh. S25) which has to be read together with the minutes of the third preliminary meeting (exh. S24).

We shall now consider all the grounds raised by learned counsel for the appellant in this appeal.

In his first ground counsel denied that the issue of s. 34(1) of the Arbitration Act was ever raised in his submission before the learned judge. It was therefore wrong for the learned judge to rule that he did. We have taken great pains in perusing the records available before us. At p. 119 of 1 A/R, we found that the learned judge had recorded the appellant's submission that they relied on s. 34(1) of the Arbitration Act. On further search of the records we discovered that in their written submission (see 4 A/R 1276 para 8.1 (C)) the appellant relied on the case of *Sarawak Shell Bhd. v. PPES Oil and Gas Sdn. Bhd.*

[1998] 3 CLJ 275 which dealt with s. 34(1) of the Arbitration Act. With respect to learned counsel for the appellant we find that the learned judge had not committed any error on this issue.

The second ground raised by learned counsel for the appellant deals with the issues of assignments, fraud, collusion and misconduct of the appellant involving the architect and the engineer. We agree with the learned judge that these are issues outside the arbitrator's jurisdiction. In the first place we find that the assignment is not part of the building contract. UOL is not a party to the arbitration clause under the building contract. Payments made to UOL cannot be challenged or questioned in the arbitration. The consultants, namely the architect and the engineer are not parties to the arbitration clause. Allegations of fraud and collusion between the contractor and the consultants should not be determined in the arbitration. Instead these allegations ought to be heard in open court. The assignment and allegations of fraud and collusion with the consultants are loosely connected with the claim.

The fact that the appellant disputes these allegations is irrelevant. The allegations have to be tried and the question is who should or can try them: the court or the arbitrator?

In *Camilla Cotton Oil Co. v. Granadex* [1976] 2 Lloyd's Rep. 20, the House of Lords held:

> (2) since the dispute involved the question whether any party had been guilty of fraud, the matter ought to be heard in the High Court rather than by arbitrators and s. 24(2) of the Arbitration Act, 1950 applied.

The issue of fraud was also raised and discussed in *Radford v. Hair & Others* [1971] 2 All ER 1089 Pennycuick VC in his judgment held:

> Turning back to the present case it seems to me that the allegation ... impute to the plaintiff actual dishonesty. It alleges, first, that he has been engaged on behalf of clients ... in which he had an interest, secondly, that he made a false statement ...; and thirdly, that he made a false statement ... . Those are all contentions involving actual dishonesty. ... It is quite true that fraud is not specifically mentioned but it seems to me ... an allegation of fraud is to be regarded as sufficient reason for taking the case away from arbitration and letting it be decided by the Court. (See also *Markholm v. Am Bisley & Lotus* [1970] NZLR 1042 and *Eagle v. NIMU Insurance Co.* [1967] NZLR 698).

Where some are parties and others are not parties to the arbitration it is best that their disputes be dealt with by the court.

In *Oxford Shipping Co. Ltd. v. Nippon Yusen Kaisha (The Eastern Saga)* [1984] 3 All ER 835 the court held:

> Since arbitration is a private procedure it is an implied term of an arbitration agreement that strangers to the agreement are excluded from the hearing and conduct of an arbitration under the agreement. In the absence of the consent of all parties an arbitrator has no power to order that a dispute referred to arbitration under the agreement be heard or determined with another dispute involving a stranger which has been referred to arbitration under a different agreement, even though the two disputes are closely related and a consolidated hearing would be convenient. (See also *Bauer (M) Sdn. Bhd. v. Daewoo Corporation* [1999] 4 CLJ 665 (CA); *Interbulk Ltd. v. Aiden Shipping Co. Ltd. (The Vimeira)* [1984] 2 Lloyd's Rep 66 at 75).

Moreover, disputes between parties cannot be divided so that part is dealt with by arbitration and another part in court (See *Turnock v. Sartoris* [1889] 43 Ch D 150).

On the above premise, we find that we are in entire agreement with the learned judge's finding that many issues have arisen which are outside the jurisdiction of the arbitrator.

The third ground raised by learned counsel touches upon the jurisdiction of the High Court in matters of arbitration. There is no doubt that the High Court has supervisory jurisdiction over arbitration and arbitrators. Section 25(2) Arbitration Act 1952 provides:

> Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to arbitration and a dispute which so arises involves the question whether any such party has been guilty of fraud, the High Court shall, so far as may be necessary to enable that question to be determined by the High Court, have power to order that the agreement shall cease to have effect and power to give leave to revoke the authority of any arbitrator or umpire appointed by or by virtue of the agreement.

Paragraph 11 of the Schedule to the Courts of Judicature Act 1964 provides additional power to the High Court to dismiss or stay proceedings by reason of multiplicity of proceedings. In any event the High Court can invoke its inherent powers under O. 92 r. 4 Rules of the High Court to make any order as may be necessary to prevent injustice. In the instant appeal the respondent should not be harassed by succession of proceedings as they are under a threat of a winding-up petition.

The House of Lords in *Beaufort Development Ltd v. Gilbert-Ash N.I. Ltd* [1998] WLR 860 held:

> ... that the arbitration clause was intended to confer on the arbitrator the plenitude of powers possessed by the court to determine the rights of the parties; that it was necessary to spell out those powers in the case of the arbitrator but not in the case of the Court since his powers were derived from the contract under which he was appointed, whereas the Court's jurisdiction was unlimited; that, therefore, the fact that power to open up, review and revise was expressly conferred upon the arbitrator but not upon the Court could not be construed as removing the Court's power, and that, accordingly, in the circumstances, there would be no injustice to the Contractors in refusing a stay. (See also *Compagnie Europene de Dereale SA v. Tradax Export SA* [1986] 2 Lloyd's Rep 301 at 304, 305; *Jasa Keramat Sdn. Bhd. v. Monatech (M) Sdn. Bhd.* [1999] 4 CLJ 533).

In the instant appeal, the learned judge had duly considered and weighed the fact that the challenge to the arbitrator's jurisdiction was made after commencement of the arbitration. The issue had become clear only after the appellant filed its statement of claim with the arbitrator and the respondent went through its case for the preparation of the defence and counterclaim.

The ousting of the arbitrator's jurisdiction is not limited to fraud alone but extends to:

a) The avoidance of multiplicity of suits;

b) The allegations connected to the subject matter which affects parties who are outside the arbitration clause;

c) All issues ought to be tried by one tribunal.

In *Turnock v. Sartoris* [1889] 43 Ch. D 150, the Court of Appeal held:

> ... that it would not be right to split up the action by referring to arbitration the matters arising under the lease, leaving the action to proceed as to the other matters, and that even if the arbitration clause could be construed so widely as to cover all the matters in respect of which damages were claimed, it would not be proper to refer them to an arbitrator, as he would have no power to determine the construction of the agreement and its effect upon the provisions of the lease.

We shall now turn to the fourth ground. In answer to counsel's submission we would say that where allegations of fraud are made the court has a discretion to stay the arbitration. The test for exclusion of the allegation of fraud whether for stay under s. 6 or for revocation of the authority of the arbitrator under s. 25(2) is the same and the same considerations and principles are applicable to both.

In *Turner v. Fenton* [1982] 1 WLR 52 the court held:

> (2) that where allegations of incompetence, negligence and impropriety were made so that a man's professional reputation was at stake, he ought to have the benefit of a trial in the High Court, even though no allegations of actual fraud or dishonesty were involved: further, that questions of the construction of a partnership agreement were also justification for retaining a case in the High Court despite an arbitration agreement, and, accordingly the stay of proceedings would be refused and the action allowed to proceed in the High Court. (See also *Redford v. Hair* [1971] 2 All ER 1089; *Taunter-Collins v. Cromie* [1964] 1 WLR 633 and *Halifax Overseas Freighters Ltd. v. Rasno Export* [1958] 2 Lloyd's Rep. 146).

The party charged with fraud is entitled as of right to a stay of arbitration whereas a party charging the other with fraud can seek the discretion of the court and the fact that the respondent here is charging the appellant (and the consultants) with fraud does not prevent them from seeking a stay. The facts revealed are more than sufficient for the learned judge to stay the arbitration and we believe he had rightly done so.

The engineer and the architect are not parties to the arbitration clause and they cannot be compelled to submit to arbitration and the arbitrator has no jurisdiction over them. The allegations of fraud and collusion between the appellant, the engineer and the architect cannot be dealt with in any proceedings (including arbitration) unless both the engineer and the architect are parties to those proceedings.

We now turn to the last ground. Under this ground learned counsel made reference to exhs. S24 and S25. According to counsel the learned judge should have read both documents together before concluding that the arbitrator had declined to deal with those allegations mentioned earlier.

Looking at S24 (the minutes of the preliminary meeting No. 3) we find that the arbitrator did not make any ruling or decision there. He merely deferred his decision. But we find the arbitrator's ruling in S25 is very clear. This is what he said (para. 2):

> During Preliminary Meeting No. 3 the Parties' oral submissions (on whether to continue with arbitration) dealt with issues of jurisdiction and arbitrability (fraud, assignment and joinders), balance of convenience, estoppels and delay to the arbitral proceedings. The first two issues now lie at Court by virtue of Respondent's application to Court and therefore it is not within my purview to consider these issues. The remaining issues may also very likely be argued at Court. It is only necessary and open to me to consider whether continuation of the arbitral proceedings could lead to much abortive work in the event arbitration proceedings are to be terminated and the disputes referred to Court.

Based on S25 alone we find that the learned judge is more than justified in coming to his conclusion that the arbitrator had declined to deal with those allegations. Further, the appellant had not made any application to correct or set aside that view of the arbitrator. We can also find no fault with the learned judge's finding that the appellant is bound by the arbitrator's ruling and that the application by the respondent complies with that ruling. The ruling of the arbitrator is binding on both parties. (See *Hartecon JV Sdn. Bhd. & Anor v. Hartela Contractors Ltd.* [1997] 2 CLJ 104 and *Tan Lay Soon v. Kam Mah Theatres Sdn. Bhd. (Malayan United Finance Bhd. Intervener)* [1992] 4 CLJ 1922; [1992] 3 CLJ (Rep) 657).

Premised on the above, and having given this matter our utmost consideration we are unanimous that this appeal cannot succeed. The appeal is hereby dismissed with costs.

My learned brothers Mokhtar Haji Sidin and Abdul Kadir Sulaiman JJCA agreed with the decision delivered at the conclusion of argument. They have read this judgment in draft and express their agreement with it.